

WETLANDS COUNCIL

MINUTES

October 8, 2013

The Wetlands Council met on Tuesday, October 8, 2013 in Rooms 112, 113, & 114 at the Department of Environmental Services, 29 Hazen Drive, Concord, NH

Attendees: Chairman Chip Kimball, Councilors: Frank Byron, Ryan Crosbie, Carol Henderson, Deborah Lievens, James Kennedy, Russ St. Pierre, Seth Prescott, Susan Slack, and Robert Snelling

Absentees: Councilors: Sharon Champagne and Thomas Sloan

Also present were: Paula Scott, Appeals Clerk and Carolyn Guerdet, Council Clerk

The regular Wetlands Council meeting was called to order by Chairman Kimball at 9:30 a.m. with introductions and a quorum present.

1. Approval of Minutes

- ***Councilor Snelling made a motion to approve the July 9, 2013 minutes with addition, second by Councilor Byron. Motion passed unanimously.***

2. Public Input: None

5. New Business -

b. ARM Fund report - Lori Sommer, Wetlands Bureau

Lori reported that 33 pre-proposals were initially received for the funds from across the state. 16 full grant applications were then submitted for all but 3 of the service areas. The committee met in September to look at the full applications. They are now going out to do site inspections. On October 17th they will reconvene to score the 13 full applications for funding. She will be here with the recommendations on November 12th. There were no applications received from the Upper and Lower Connecticut and Androscoggin watersheds. If their money is not spent after 2 years the money can be spread to nearby watersheds.

a. Wetlands Bureau Report – Mary Ann Tilton, Wetlands Bureau

Mary Ann reported an EPA grant was received and used for:

- 1) A PT position to help the mitigation program develop a tracking system. They will be looking at functions lost/gained and develop a tracking sheet. This is to see that federal mandates are being met for no net loss of wetlands functions.
- 2) UNH Cooperative Extension to provide trainings on the New Hampshire method. It will include desktop computer training for GIS layers, etc. Also receiving monies from this grant were DRED/NHB for training on Ecological Integrity Assessment(EIA) looking at plant communities. All trainings will look at same sites in Bear Brook for consistency of analysis.

A grant was also received through the watershed bureau. The state of Maine has a system that looks at the biological integrity index for invertebrates. They will be sampling methods to develop water quality standards.

Rule making is ongoing. They are meeting biweekly for how the rule making will go forward. First is an initial outreach to stakeholders/public for rule improvement. 2nd part is the staff will be doing research and development for rules. Then another outreach session will be set. No set schedule as of yet. Questions were addressed. DES has taken the position they can't wait for federal agencies. Need to meet the needs of NH. They are working to make more science based and transparent. The hope is to provide a written schedule at the next meeting.

Preliminary Notice of Appeals - 4 have been filed for Water Council only. 2 didn't file appeals and 2 have been stayed.

3. Status Report

I. New Appeals

Docket No. 13-07 WtC – Judith Evans, Trustee of the L.M.E. Nominee Trust

Subject: August 7, 2013 Permit Denial on Reconsideration, file #2013-00379

Status: September 5, 2013 received Notice of Appeal. 9/10/13 issued insufficient appeal letter. 9/13/13 received Revised Notice of Appeal. 9/17/13 issued receipt of revised appeal letter. Council to accept or dismiss appeal at its November 12, 2013 meeting.

II. Decisions that need to be written/finalized and issued.

Docket No: 12-07/11-03 WtC – Joseph DeVelis

Subject: 1/25/11 Administrative Order No. 11-002 WD

Status: Subject: 1/25/11 Administrative Order No. 11-002 WD

Presiding Officer: David Conley assigned by AG on Nov. 28, 2012(for consolidated appeals)

Status: Rulings on Motion to Extend Time and Motion to Modify Pre-Hearing Order (PHO) were issued on Nov. 2, 2011 and mailed on Nov. 3, 2011. Hearing was set for March 13, 2012 @ 9 a.m. 3/9/12 Motion was granted and notice sent. Hearing scheduled for March 13 was continued. Councilor Crosbie spoke with Atty. English regarding Motion to Modify Hearing Date. March 9, 2012 Motion was granted and notice sent. Hearing rescheduled to October 9, 2012 at 10 a.m. Hearing Postponement notice was issued on Sept. 19, 2012. Oct. 2, 2012 received letter from Atty. Bisbee regarding the Hearing Postponement letter. Status carried forward from Docket No. 12-07 WtC- Subject: 6/20/12 Denial on Reconsideration of Permit application #2012-00368. On July 20, 2012 received Notice of Appeal. 7/24/12 issued receipt of appeal letter. 8/15/12 received Appearance from Atty. Evan Mulholland. 9/14/12 issued appeal accepted letter. Council voted Nov. 13th to consolidate this Docket and Docket No. 12-07 WtC – Joseph DeVelis. 11/13/12 Requested Hearing Officer for consolidated appeals. 12/3/12 sent notice of PHC scheduled for Jan. 28, 2013 at 9 a.m. PHO was issued on January 28, 2013 with notice of Hearing scheduled for April 9, 2013 at 9 a.m. March 11, 2013 received Appellants' Memorandum of Law. 3/25/13 received DES' and Appellants' Witness and Exhibit Lists. April 8, 2013 received Assented-to-Motion to Continue. 4/8/13 issued ruling granting Motion to Continue. 4/9/13 issued notice of rescheduled hearing which is scheduled for June 11, 2013 at 9 a.m. 4/17/13 received Assented to Motion to Amend Witness List. 4/18/13 issued ruling on Motion to Amend, which was granted. June 10, 2013 issued ruling on Appellants' Question of Law. Hearing was held on June 11, 2013 with deliberations scheduled for July 9, 2013. 7/2/13 issued via email, reminder of deliberations being held on July 9, 2013 at 10 a.m. to Attorneys Bisbee and Mulholland. Deliberations were held on July 9, 2013. Draft Decision and Order is before the Council for consideration today, October 8, 2013.

III. Hearings or PHCs Pending

Docket No: 11-09 WtC – Thomas Morrissey & Margaret Russell, et al

Hearing Officer: Chip Kimball

Recused: Councilor Kennedy

Status: June 24, 2013 received 6/20/13 NH Supreme Court Decision remanding the appeal back to the Council stating, "Because the Bureau misinterpreted RSA 482-A:3, I(a) and did not consider the total wetlands impact of the proposed project, we vacate and remand to the council for further proceedings consistent with this opinion." July 5, 2013 received letter from Attorney Aslin for the Intervenors. 7/8/13 received letter from Attorney Hawkins for the Appellant. Chairman Kimball read aloud the draft Order of Remand. The Council has no authority to tell the Department what to do by statute or rule, except look at the Supreme Court's decision. July 9, 2013 Council issued Order of Remand.

Docket No: 12-10 WtC – Robert and Katherine Michele

Subject: 9/4/12 Denial of Reconsideration for permit No. 2007-02868 issued to Joseph and Linda Bremner

Hearing Officer: David Conley, Esq. appointed by AG on 11/28/12

Actions: On Oct. 4, 2012 rec'd Petition for Appeal Oct. 5, 2012 issued receipt of appeal letter. Oct. 30, 2012 rec'd Objection to Petition for Appeal. Council accepted appeal with request for complete copies of the relevant court decision to be forwarded to the Council at its Nov. 13, 2012, meeting. Pre-hearing Conference(PHC) was held on 1/28/13 and continued to May 13, 2013 at 10 a.m. April 2, 2013 received Motion to reschedule Continued PHC from Appellant. 4/8/13 received Joint Opposition to Appellant's Motion to Reschedule Continued Pre-Hearing Conference. 4/9/13 the hearing officer denied Appellants' Motion to Reschedule Continued Pre-Hearing Conference. Ruling denying motion was issued 4/9/13. May 8, 2013 sent notice of unexpected conflict, Hearing Officer unable to attend scheduled PHC via email. 5/9/13 sent notice of rescheduled PHC scheduled for 5/17/13. 5/9/13 received Attorney Johnson's request to reschedule via email. 5/13/13 sent notice of newly rescheduled PHC for the same date but a different time. 5/17/13, 2nd PHO issued with hearing scheduled for October 8, 2013 at 9 a.m. June 21, 2013 received copy of Cheshire County Superior Court order on Bremner's Motion to Dismiss, which was denied. 6/28/13 received Appellant's, DES' and Permittee's Memorandums of Law. July 15, 2013 received Appellants' More Definite Statement of Facts In support of Appeal. September 10, 2013 sent email to the parties at the direction of the Hearing Officer, directing them to communicate with each other to establish an agreeable discovery schedule and determine time necessary for arguments. 9/18/13 received Fully Assented-to Motion to Reschedule Hearing to January 14, 2014. 9/24/13 issued letter granting Motion to Reschedule hearing and set new hearing date for January 14, 2014 at 9 a.m. 9/30/13 issued ruling on Appellants' Question of Law.

Docket No: 13-03 WtC – Kevin and Melanie McNamara

Subject: 4/4/13 Wetlands Minimum Impact Forestry Notification Decision on Reconsideration

Hearing Officer: David Conley, Esq. appointed by AG on 7/10/13

Status: May 2, 2013 received Notice of Appeal. 5/3/13 issued insufficient appeal letter. 5/15/13 received revised appeal. 5/16/13 issued receipt of appeal letter. Council to accept or decline appeal at its July 9, 2013 meeting. 7/9/13 Council accepted the Appeal. 7/10/13 issued appeal accepted letter. 7/31/13 sent notice of PHC scheduled for August 21, 2013 at 8:30 a.m. 8/9/13 received Appearance from Atty. Mulholland. 8/21/13 PHC was held and PHO was issued. 9/11/13 received Consented to Motion to Extend Time from PHO. 9/13/13 issued ruling granting the Motion to Extend Time.

IV. Inactive/Status Letter or Pending Settlement/Withdrawal

Docket No: 10-10 WtC – Donald Lee

Subject: 5/23/10 Decision on Reconsideration, Wetlands File No. 2008-01253

Presiding Officer: Chip Kimball assigned by AGO on 1/26/11; David Conley, Esq. appointed by AG on 5/8/13.

Status: Hearing scheduled for Jan. 10, 2012 per notice of PHO issued on 8/31/11 Received Suggestion of Bankruptcy on Dec. 5, 2011. On 12/6/11 rec'd withdrawal of appearance from appellant's attorney and issued Order for Continuance. Appeal is Stayed due to filing in Bankruptcy Court. May 7, 2013 received Motion to Remove Stay from Bankruptcy on the Appeal. 5/8/13 per request from Chairman Kimball, Ms. Scott requested another hearing officer via email. 5/8/13 issued ruling granting Motion to Remove Stay. 5/17/13 issued PHC notice scheduled for 6/12/13 at 10:30 a.m. June 12, 2013 received Summary of Procedural Background from Intervenor. Issued Pre-hearing order on 6/12/13. 6/14/13 issued Further Decision and Order on PHC with a status report to be filed by September 15, 2013. 9/10/13 received what appears to be a Motion from the Appellant to resume the appeal. 9/12/13 received Objection to Motion to Resume Donald Lee Appeal, and Intervenor's Status report. 9/16/13 received Appearance of Atty. Noether for the Department. State's Response to Applicant's Motion to Resume Appeal and State's Partially Assented-to Motion to Dismiss Appeal or to Affirm Denial and State's Status Report. Hearing Officer to rule on Motions and Objection.

Docket No: 10-14 WtC – Akwa Marina Yacht Club

Subject: 6/11/10 Decision on Reconsideration, Wetlands File No. 2009-01047

Presiding Officer: David Conley, Esq. appointed by AG on 12/22/11

Status: On Nov. 2, 2011, rec'd DES' addendum to the Witness and Exhibit List. 11-07-11 Assented-to Motion to Continue was filed. Motion to Continue was granted verbally on 11/7/11 and PO will have written ruling out within a few days. Rescheduled hearing for Feb 14, 2012 @ 9 a.m., notice sent on Dec. 30, 2011. Jan 4, 2012, appellant filed Assented-To Motion to Continue. Jan 9, 2012, PO granted Motion to Continue. Hearing has been rescheduled to June 12, 2012 @ 9 a.m., notice given 1/18/12. Hearing was held June 12th. Hearing was continued until a settlement agreement is made or either party requests to resume the hearing. The appellant's attorney will update the council within 60 days as to progress (Aug. 11, 2012). 2/8/13 issued Hearing Officer's order for an updated Status Report to be filed by April 5, 2013. April 4, 2013 received Appellant's Status Report

requesting to submit another report in 60 days. 4/8/13 issued Hearing Officer's Order for an updated Status Report be filed by June 4, 2013. 6/4/13 received Appellant's Status Report requesting to submit another report in 60 days. 6/6/13 issued letter granting request to submit an updated Status Report in 60 days, by August 5, 2013. 8/5/13 received Appellant's Status Report requesting to submit another report in 60 days. 8/8/13 issued letter granting request to submit an updated Status Report in 60 days, by October 4, 2013. No Status Report has been received. A letter will be sent that if a Status Report is not issued within 20 days it will be Summarily Dismissed.

Docket No.: 12-14 WtC – Mastoran Corporation and B & P Realty Ventures, LLC

Subject: 11/8/12 Denial on reconsideration of Denial of Application File #2012-00768

Hearing Officer: David Conley, Esq. appointed by AG on 2/13/13

Status: November 27, 2012 received Notice of Appeal and Motion to Stay Appeal. 11/28/12 issued insufficient appeal letter. December 28, 2012 received supplement to Notice of Appeal and Motion to Stay Appeal. January 3, 2013 issued receipt of revised appeal. Council accepted appeal at its January meeting. January 23, 2013 issued appeal accepted letter. Hearing Officer to rule on Motion to Stay Appeal. March 13, 2013 issued letter regarding the granting of the Motion to Stay Appeal.

Docket No: 12-07/11-03 WtC – Joseph DeVelis - Continued

Draft Decision on DeVelis had been distributed to the council members who had been at the hearing.

Atty. Conley reviewed the draft order that had been sent out. Questions were addressed and suggestions for clarification received.

- ***Motion to adopt the Decision and Order, with suggested changes, made by Councilor Henderson, second by Councilor Slack. Motion passed unanimously. Abstained by Councilors Prescott and Crosbie.***

4. Old Business -

None

6. Next Meetings –

The next meeting will be November 12, 2013.

No meeting in December.

There is a hearing at 9 a.m. on January 14, 2014, so the regular meeting will begin at 8:00 a.m.

Chairman Kimball shared that the NH Association of Conservation Commissions will be meeting on November 2, 2013. He will be speaking about the Wetlands Council.

Councilor St. Pierre shared the Wetlands and Shoreland RSAs have been updated on the web to reflect the legislative changes made in the last session.

The appeal of the Hooksett Land Development will be held at the Supreme Court on November 13th.

7. Adjournment

- ***Councilor Crosbie made a motion to adjourn, second by Councilor Lievens. Motion passed unanimously.***

Meeting adjourned at 10:41 a.m.